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ONG YEW TEIK v. KAMAL YP TAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR

MOHD ARIEF EMRAN ARIFIN JC

[WRIT SUMMONS NO: WA-22NCVC-460-06-2021]

14 JUNE 2022

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Abstract – (i) A party cannot re-litigate issues that were, or could have been, raised in a previous suit. If evidence, allegedly fraudulent or perjured, was available during a prior suit, claims based on that evidence must be pursued within that suit, not in a new proceeding; (ii) In Malaysia, the tort of malicious prosecution is limited to claims arising from the mala fide institution of winding-up or bankruptcy proceedings. It does not extend to general allegations of malicious prosecution in ordinary civil proceedings; (iii) The Malaysian common law does not recognise a general tort of fraud based on alleged perjury in previous civil proceedings. Recognising such a tort would contradict the doctrine of res judicata and witness immunity; (iv) Witnesses are entitled to immunity from claims based on their evidence given in court. Even if the conduct of a witness in a previous suit is considered egregious, new legal proceedings based on that conduct is not permissible.

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EVIDENCE: Witness – Perjury – Claimant commenced civil suit against party in earlier suit – Witnesses had given evidence in earlier suit – Claimant later claimed against witnesses based on tort – Whether there was substantial duplication of issues and reliefs – Whether against principle of res judicata – Whether claim abuse of process – Whether claimant barred from pursuing claim

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TORT: Abuse of process – Claim – Claimant commenced civil suit against party in earlier suit – Witnesses had given evidence in earlier suit – Claimant later claimed against witnesses based on tort of abuse of process – Whether facts that claimant relied on in claim under torts available during earlier suit – Whether claim ought to be struck out

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TORT: Malicious prosecution – Claimant commenced civil suit against party in earlier suit – Witnesses had given evidence in earlier suit – Claimant later claimed against witnesses based on tort of malicious prosecution – Malaysian jurisprudence on cause of action of malicious prosecution – Limitations – Whether extended to allegations raised by claimant against witnesses

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TORT: Conspiracy – Claimant commenced civil suit against party in earlier suit – Witnesses had given evidence in earlier suit – Claimant later claimed against witnesses based on tort of conspiracy – Whether tort of conspiracy established

TORT: Fraud – Perjury – Claimant commenced civil suit against party in earlier suit – Witnesses had given evidence in earlier suit – Claimant claimed against witnesses based on tort of fraud based on perjury – Position in Malaysia regarding general tort of fraud based on perjury – Whether issue of perjury or presentation of false evidence should have and could have been raised in earlier suit – Whether claim ought to be struck out

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CIVIL PROCEDURE: Striking out – Application for – Claimant commenced civil suit against party in earlier suit – Witnesses had given evidence in earlier suit – Claimant claimed against witnesses based on tort – Witnesses applied to strike out claim – Whether claim subject to doctrine of *res judicata* in narrow and wider sense – Whether there was substantial duplication of issues and reliefs – Whether against principle of *res judicata* – Whether claim abuse of process – Whether claimant barred from pursuing claim based on tort of abuse of process – Rules of Court 2012, O. 18 r. 19

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The plaintiff had commenced a civil suit against the first defendant based on an acknowledgment of a debt in respect of the sum RM8,018,225 for the sale of the share in a company known as Euroceramic Technologies Company Ltd ('ECT') ('Suit 1333'). The first defendant had also faced a second suit by one Roger Yue *via* a civil suit ('Suit 1530'), in relation to an alleged breach of a sale and purchase agreement of the same ECT shares. Roger Yue alleged that the sum of RM3.8 million was due. In both suits, the first defendant had filed a defence and counterclaims to the claims filed by the plaintiff and Roger Yue. The first defendant and the defendants joined in this suit had given evidence in Suit 1333. In this suit, the plaintiff's claims against the defendants were based on the following torts: (i) the defendants had committed fraud and perjured themselves in Suit 1333 at the expense of the plaintiff and to cause damage and loss to the plaintiff concerning his claim under Suit 1333; (ii) the defendants had conspired by fabricating evidence, creating false facts and evidence presented in Suit 1333 to cause damages and loss to the plaintiff concerning his claim under Suit 1333; (iii) the defendants had committed the tort of abuse of process based on the same acts of alleged fraud, perjury, fabrication of evidence and creating false evidence to prevent the plaintiff from exercising his rights and obtaining redress from the courts; and (iv) the first defendant had committed the tort of malicious prosecution based on the same acts of alleged fraud, perjury, fabrication of evidence and creating false evidence to prevent the plaintiff from exercising his rights and obtaining redress from the courts. The first to fifth defendants applied to strike out the suit (encls. 13, 16, 34 and 36), pursuant to O. 18 r. 19 of the Rules of Court 2012 on the following grounds that: (i) the claim was subject to the doctrine of *res judicata* in the narrow and wider sense; (ii) the claim was an abuse of process; (iii) the plaintiff had not pleaded a valid cause of action against the defendants; (iv) the defendants were entitled to rely on witness privilege; and (v) the plaintiff had been fully compensated for his alleged damages in the previous suit.

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A Held (striking out claims against first to fifth defendants):

- (1)** The facts that the plaintiff relied on, *ie*, the alleged fraudulent evidence presented at trial, the alleged perjury, the alleged false affidavits and legal submissions filed by the first defendant with the alleged assistance of the other defendants, were all available during Suit 1333. There were no valid reasons presented by the plaintiff that prevented him from filing a claim based on the tort of abuse of process against the first defendant in Suit 1333. This could have and should have been undertaken in Suit 1333, at the very least, as an answer to the counterclaim filed by the first defendant. Since the plaintiff opined that the evidence presented in the affidavits, documents filed and the submissions were false and were intended for a collateral purpose of exerting pressure against the plaintiff, then he should have raised these issues in Suit 1333. It would be abusive for the plaintiff to now attempt to re-open the issues again in this new suit. The claim against the second to sixth defendants was all concerning the evidence that was presented in the earlier suit and the damages claimed were all relating to the failure of the first defendant to pay the principal sum of RM8 million expeditiously. There was clear ‘substantial duplication of issues and reliefs’ sought in Suit 1333 and those now claimed by the plaintiff against the defendants. The alleged perjury and fraudulent representation evidence were before the High Court and were eventually dealt with by the Court of Appeal. It could not, therefore, be said that these issues were not before the court in Suit 1333. To allow the plaintiff to re-open this issue would be contrary to the principle of *res judicata*. The plaintiff was barred from pursuing the claim based on the tort of abuse of process against the first, third, fourth and fifth defendants. (paras 26-27 & 36-39)
- (2)** The current Malaysian jurisprudence on the cause of action of malicious prosecution limited the application of the said tort to claims that relate to either the institution of winding-up or bankruptcy proceedings that were instituted *mala fide*. As this court was bound by the doctrine of *stare decisis*, the tort of malicious prosecution of a civil proceeding under Malaysian law did not extend to the allegations raised by the plaintiff against the defendants. The claim against the defendants based on the tort of malicious prosecution should be struck out. (paras 40 & 49)
- (3)** The allegations of conspiracy in this case pertained to the same unlawful acts based on the alleged tort of abuse of process and the tort of malicious prosecution. Despite the claims had been identified separately by the plaintiff as being: (i) fraud and perjury; (ii) tort of abuse of process; and (iii) malicious prosecution, these claims were based on the same factual matrix that was the alleged false evidence, affidavits, documents and legal arguments presented in Suit 1333. Nonetheless, based on the pleadings, the plaintiffs had sufficiently pleaded the

necessary elements for the tort of conspiracy against the defendants. The court declined to exercise the discretion to strike out the claim for conspiracy on this ground. (paras 51-53)

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- (4) Malaysian common law did not recognise a general tort of fraud based on the alleged perjury in Suit 1333, as suggested by the plaintiff. The alleged existence of this tort would also be contrary to the doctrine of *res judicata* and even to the common law doctrine of witness immunity that had been recognised under our laws. Once this new tort is recognised, it would potentially lead to the opening of floodgates to every litigant who is dissatisfied with the evidence presented by witnesses for the other side on the ground of perjury and fraud. Furthermore, the issue of perjury or presentation of false evidence should have and could have been raised in the earlier suit. It would be inappropriate for this court to now investigate the same factual matrix and the evidence presented by the defendants in Suit 1333 to determine again whether they have perjured themselves. These issues should have been dealt with in Suit 1333 and not by fresh proceedings. The plaintiff's claim against the defendants, that was grounded on this alleged tort, was struck out. (paras 54, 55 & 60)

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- (5) Based on the current legal position under Malaysian law, the defendants were entitled to rely on the defence of witness immunity. Furthermore, however egregious the conduct of the defendants in Suit 1333, these issues should have been heard and disposed of in the said suit. To enable the plaintiff to now file a new suit based on the same facts and evidence against the witnesses was not in the best interest of the administration of justice. The claims against the defendants should be struck out. (paras 67, 68 & 70)

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- (6) The claim for damages related to the failure of the first defendant to pay the sum of RM8,018,225 to the plaintiff early. Even the claims for exemplary and aggravated damages related to the delay in payment by the first defendant. The claims relating to the loss of the mining ventures, bankruptcy and blacklisted by banks, all related to the failure by the plaintiff to pay the sums that were due for the ECT shares. One of the claims by the plaintiff was for legal fees incurred for pursuing Suit 1333 against the first defendant and for defending the counterclaim in the said suit. It was an abuse of process of this court to allow the plaintiff to attempt to claim new damages against the defendants based on the same failure to pay the sum of RM8,018,225 that was earlier pursued in Suit 1333. The plaintiff should have and could have raised these damages in the earlier suit, at least, against the first defendant. It would be an abuse of process of this court to allow the plaintiff a second bite of the cherry *albeit* under different guises of claims. The claim against the defendants for these damages should be struck out to ensure that the court's process was not abused by the aforesaid litigant and to ensure finality to litigation. (paras 72, 73 & 78)

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A Case(s) referred to:

- Alias Othman v. Clement Kua Hock Beng & Ors* [2017] 10 CLJ 733 HC (*refd*)
Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd & Ors [1984] 2 CLJ 88; [1986] CLJ (Rep) 279 FC (*refd*)
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (*refd*)
Atland Containers Ltd v. Macs Corp [1974] CanLii 864 (*refd*)
- B** *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC (*refd*)
Bayne v. Blake [1909] 9 CLR 347 (*refd*)
Chang Nga & Ors v. Lee Lang & Ors [2009] CLJU 372 CA (*refd*)
Chung Khiaw Bank (Malaysia) Bhd v. Tio Chee Hing [2004] 3 CLJ 59 CA (*refd*)
Crawford Adjusters And Another v. Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17 (*refd*)
- C** *Crouse v. McVickar* 207 NY213 (*refd*)
Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal [2016] 3 CLJ 676 CA (*refd*)
D'Orta - Ekenaike v. Victoria Legal Aid [2005] HCA 12 (*refd*)
- D** *Daishhowa (M) Wood Products Sdn Bhd v. Kepong Wood Products Co Sdn Bhd* [1980] CLJU 14; [1980] 1 LNS 14 FC (*refd*)
Daniels v. Chief Constable of South Wales [2015] EWCA Civ 680 (*refd*)
Dr Aishah Tul Radziah L Hussin v. Dr Suresh Kumarasamy & Ors [2015] 10 CLJ 222 HC (*refd*)
Eng Mee Yong v. Letchumanan [1979] CLJU 18; [1979] 1 LNS 18 PC (*refd*)
- E** *Gabungan Strategik Sdn Bhd v. Geonamics (M) Sdn Bhd & Ors* [2021] CLJU 1743; [2021] 1 LNS 1743 HC (*refd*)
Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC (*refd*)
Gregory v. Portsmouth City Council [2000] 1 AC 491 (*refd*)
Greig William Alexander Mitchell & Kenneth Melvin Kryss (Joint liquidators Of MBI International) v. Sheikh Mohamed bin Issan Al Jaber & Ors [2021] EWHC 912 (*refd*)
- F** *Heaton v. AXA Equity And Law* [2002] 2 AC 329 (*refd*)
Ho Hup Construction Company Bhd v. Zen Courts Sdn Bhd & Ors [2018] 1 LNS 340 HC (*refd*)
Jones v. Kaney [2011] UKSC 13 (*refd*)
KHK Advertising Sdn Bhd v. Siera Management Sdn Bhd (In Liquidation) [2018] 8 CLJ 423 CA (*refd*)
- G** *Lim Chee Kuo v. The Pacific Bank Bhd* [2009] CLJU 654; [2009] 1 LNS 654 CA (*refd*)
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC (*refd*)
Loh Kai Shui v. HSCB International Trustee & 3 Ors [2021] HKCF 11539 (*refd*)
Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA (*refd*)
- H** *OM Cahaya Mineral Asia Bhd v. Damansara Realty (Pahang) Sdn Bhd* [2018] 5 CLJ 587 CA (*refd*)
Paul v. Sasso [2017] ONSC 16 (*refd*)
Quartz Hill v. Eyre (1883) 11 QBD 674 (*refd*)
Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC (*refd*)
- I** *Reynolds v. Kingston (City) Police Services Board* [2007] ONCA 166 (*refd*)
Ross v. Preston 292 NY433 (*refd*)
Ross v. Wood 70 NY8 (*refd*)
Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 SC (*refd*)

Smith v. Lewis 3 Johns 157 (*refd*)

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Spautz v. Williams [1992] HCA 34 (*refd*)

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC (*refd*)

Takako Sakao v. Ng Pek Yuen & Anor (No 3) [2010] 1 CLJ 429 FC (*refd*)

TAZ Logistics Sdn Bhd v. TAZ Metals Sdn Bhd & Ors [2019] 2 CLJ 48 CA (*refd*)

Tetuan Bee Ling & Co lwn. Vijendran Ponniah [2010] 6 CLJ 643 CA (*refd*)

Tractors Malaysia Bhd v. Tio Chee Hing [1975] CLJU 133; [1975] 1 LNS 133 PC (*refd*)

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Virgin Atlantic Airways Ltd v. Zodiac Seats [2013] UKSC 46 (*refd*)

Vivaganth Santharasilan v. Public Bank Bhd [2019] 1 CLJ 605 CA (*refd*)

Willers v. Joyce And Another [2016] UKSC 43 (*refd*)

Young v. Hones [2014] NSWCA 337 (*refd*)

Legislation referred to:

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Contracts Act 1950, s. 74

Rules of Court 2012, O. 18 r. 19(1)(a)

For the plaintiff - Rajan Navaratnam & Tay Yikuan; M/s Roshan Selvaratnam

For the 1st defendant - Robert Low, Karen Yong & Khong Mei Yan; M/s Ranjit Ooi & Robert Lau

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For the 2nd defendant - Jessica Chew & Elizabeth Lau; M/s Elizabeth Lau

For 3rd & 5th defendants - Surendra Ananth; M/s Surendra Ananth

For 4th defendant - Nicholas Poon & Michelle Liu; M/s Kit & Assocs

For 6th defendant - Yee Ki Kenn; M/s Yee Teck Fah & Co

Reported by Lina E

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JUDGMENT

Mohd Arief Emran Arifin JC:

Introduction

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[1] The plaintiff's claims against the defendants are based on the following torts:

- (i) the defendants had committed fraud and perjured themselves at the earlier trial in the Civil Suit No. S5-22-1333-2007 (1333 Suit) at the expense of the plaintiff and to cause damage and loss to the plaintiff concerning his claim under the said 1333 Suit;
- (ii) the defendants had conspired by fabricating evidence, creating false facts and evidence presented at the 1333 Suit to cause damage and loss to the plaintiff concerning his claim under the said 1333 Suit;
- (iii) the defendants had committed the tort of abuse of process based on the same acts of alleged fraud, perjury, fabrication of evidence and creating false evidence to prevent the plaintiff from exercising his rights and obtaining redress from the courts; and

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- A (iv) the first defendant had committed the tort of malicious prosecution based on the same acts of alleged fraud, perjury, fabrication of evidence and creating false evidence to prevent the plaintiff from exercising his rights and obtaining redress from the courts.
- B [2] Particulars of the claim by the plaintiff against the defendants can be seen in the following paragraphs of the plaintiff's statement of claim:
- (i) fraud based on the alleged perjury by the defendants – paras. 35 to 63 of the statement of claim;
- (ii) conspiracy – paras. 63 to 64 of the statement of claim;
- C (iii) the tort of abuse of process - paras. 65 to 65.5 of the statement of claim; and
- (iv) the tort of malicious falsehood - paras. 66 to 70.1 of the statement of claim.
- D [3] The first, second, third, fourth, and sixth defendants have applied to strike out the suit (encls. 13, 16, 34 and 36) under O. 18 r. 19 of the Rules of Court 2012 on the following grounds:
- (i) that the claim is subject to the doctrine of *res judicata* in the narrow and the wider sense;
- E (ii) that the claim is an abuse of process;
- (iii) the plaintiff has not pleaded a valid cause of action against the defendants;
- F (iv) the defendants are entitled to rely on witness privilege; and
- (v) the plaintiff has been fully compensated for his alleged damages in the previous suit.
- I note, however, the second defendant has relied solely on the ground of witness immunity and relies on O. 18 r. 19(1)(a) of the Rules of Court 2012.
- G [4] It is important that I also state a brief history of the litigation between parties:
- (i) on or about 19 November 2007, the plaintiff had commenced a civil suit against the first defendant based on an acknowledgement of a debt dated 6 November 2006 in respect of the sum of RM8,018,225 (1333 Suit) for the sale of the shares in the company known as Euroceramic Technologies Company Ltd ("ECT");
- H (ii) the first defendant had also faced a second suit filed by one Roger Yue via the Civil Suit No. D-22-NCC-1530-2010 (1530 suit) in relation to an alleged breach of a sale and purchase agreement of the same ECT shares. Roger Yue alleges that the sum of RM3.8 million is due;
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- (iii) in both suits, the first defendant had filed a defence and counterclaim to the claims filed by the plaintiff and Roger Yue; and A
- (iv) the first defendant and the defendants joined in this suit had given evidence in the 1333 Suit which is summarised as follows:
 - (a) plaintiff's case - second defendant. B
 - (b) first defendant's case - first defendant, third, fourth and fifth defendants.

Law On Striking Out

[5] The applicable law on striking out a statement of claim or any pleading under O. 18 r. 19 of the Rules of Court 2012 is trite and is summarised as follows: C

- (i) the court must consider whether an applicant could show that it is a plain and obvious case that recourse should be had to the said process under the above-referred rule and that the claim on the face of the document is "obviously unsustainable"; D
- (ii) a striking out is not a trial on affidavits and the court should not conduct a minute examination of the documents through the affidavit. As long as there is a valid claim on the face of the pleadings or raises some questions fit to be tried it should not be struck out; and E
- (iii) a striking out order should not be entered if there is an issue of law that requires lengthy argument and mature consideration especially when the issue requires deliberation after taking evidence at trial.

[6] I am guided by the decisions of our Superior Courts in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75 and *OM Cahaya Mineral Asia Bhd v. Damansara Realty (Pahang) Sdn Bhd* [2018] 5 CLJ 587. F

[7] I also refer to the often-quoted judgment of the Court of Appeal in *Sivarasa Rasiah v. Che Hamzah Che Ismail (supra)* and *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd (supra)*. If the pleadings disclose a reasonable cause of action and if it could be shown that there are "issues of law that need to be elaborated and argued in great detail and for mature consideration", then this court should not strike out the suit. G

[8] If there are relevant factual issues that require deliberation of the facts through witnesses, the power under O. 18 r. 19 should not be utilised. H

[9] However, I am mindful of my duty to consider the claim and the affidavit evidence in totality to determine whether there exists a reasonable cause of action that ought to be referred to at trial. I

- A [10] I refer to the judgment of Mohd Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail (supra)*, where His Lordship quoted the judgment of the Privy Council in *Eng Mee Yong v. Letchumanan* [1979] CLJU 18; [1979] 1 LNS 18:

B Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

C **Whether This Court Should Strike Out The Statement Of Claim**

Res Judicata (Both In The Restricted Sense And Based On The Doctrine Laid Down In Henderson v. Henderson) And Abuse Of Process

- D [11] It is trite that the doctrine of *res judicata* bars a litigant from attempting to relitigate issues that have either been litigated and decided by a court of law or issues or points that could have and should have been litigated in the earlier suit. I refer to the decision of Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, where His Lordship stated:

E Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say that *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

F The starting point ought to be the celebrated passage by Wigram, V.C., in the case of *Henderson v. Henderson* [1843] 3 Hare 100 115 which is:

G *The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.*

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- H To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg. please see s. 40 of Evidence Act, 1950, it will be readily understood that when Wigram, V. C. spoke of "points", the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties. The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share of the
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confusion in connection with the famous passage of Wigram, V.C. which Lord Shaw in Hoystead v. Commissioner of Taxation [1962] AC 155, 170 spoke of as “settled law” in the Privy Council.

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Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

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The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action ie. the cause of action, merges into the said final judgment; in layman’s language, the cause of action has turned into the said final judgment. The said cause of action may not be re-litigated between the same parties because it is *res judicata*.

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In order to prevent multiplicity of actions and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, *such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not either deliberately or due to inadvertence ...*

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(emphasis added)

[12] To determine whether *res judicata* is applicable, this court must “undertake a minute examination of the history of the prior litigation”. See *Chung Khiaw Bank (Malaysia) Bhd v. Tio Chee Hing* [2004] 3 CLJ 59. I also refer to *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] CLJU 133; [1975] 1 LNS 133; [1975] 2 MLJ 1; *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 and *Ho Hup Construction Company Bhd v. Zen Courts Sdn Bhd & Ors* [2018] 1 LNS 340.

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[13] The doctrine of *res judicata* is now seen as a substantive rule intended to ensure that there is a finality to litigation and that parties should not be vexed twice for the same subject matter. I refer to the decision of Lord Sumption SCJ in *Virgin Atlantic Airways Ltd v. Zodiac Seats* [2013] UKSC 46:

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24. I do not accept this. *The principle in Henderson v. Henderson has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before.* There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in *Yat Tung*. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, *Johnson v. Gore-Wood & Co* [2002] 2 AC 1, in which the House of Lords considered their effect. This appeal arose out of an application to strike out proceedings on the ground that the plaintiff’s claim should have been made in an earlier action on the same subject-matter brought by a company under his control. Lord Bingham took up the earlier suggestion of Lord Hailsham of St. Marylebone LC in *Vervaeke v. Smith* [1983] 1 AC 145, 157 that that the principle in *Henderson v. Henderson* was “both a rule of public policy and an application of the law of *res judicata*”. He expressed his own view of the relationship between the two at p 31 as follows:

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A *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. *The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.* This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. *The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been,*

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E *so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before”.*

The rest of the Committee, apart from Lord Millett, agreed in terms with Lord Bingham’s speech on this issue. Lord Millett agreed in substance in a concurring speech. He dealt with the relationship between *res judicata* and the *Henderson v. Henderson* principle at pp 58H-59B as follows:

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G Later decisions have doubted the correctness of treating the principle as an application of the doctrine of *res judicata*, while describing it as an extension of the doctrine or analogous to it. In *Barrow v. Bankside Members Agency Ltd* [1996] 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in *Manson v Vooght* [1999] BPIR 376, 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. *But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions.* While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of *res judicata* and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.

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It was clearly not the view of Lord Millett in *Johnson v. Gore-Wood* that because the principle in *Henderson v. Henderson* was concerned with abuse of process it could not also be part of the law of *res judicata*. Nor is there anything to support that idea in the speech of Lord Bingham. The focus in *Johnson v. Gore-Wood* was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run (Mr Johnson's counsel conceded that he and his company were privies, but Lord Millett seems to have doubted the correctness of the concession at p 60D-E, and so do I). *Res judicata* and *abuse of process* are juridically very different. *Res judicata* is a rule of substantive law, while *abuse of process* is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v. National Westminster Bank* at p 110G, "*estoppel per rem judicatam*, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process. (emphasis added)

[14] The same explanation was earlier made by Wan Suleiman FJ in *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 where he stated:

The second defence is one of *res judicata*. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V.C. in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. (p. 590).

This reference to "abuse of process" had previously been made in *Greenhalgh v. Mallard* [1947] 2 All ER 255 per Somervell LJ and their Lordships endorse it. *This is the true basis of the doctrine and ought only to be applied when the facts are such as to amount to an abuse*: otherwise there is a danger of a party being shut from bringing forward a genuine subject of litigation.

(emphasis added)

A [15] I have considered the statement of claim filed by the plaintiff against the defendants and I find that the claim arises from the facts relating to the alleged debts by the first defendant to the sum of RM8,120,225 that arose from the transactions relating to the shares held in a company in Thailand known as Euroceramic Technologies Companies Ltd ("ECT"). This debt
B allegedly appeared in the acknowledgement of debt executed by the first defendant in favour of the plaintiff as contained in the document that the plaintiff refers to as the letter of pre-agreement/undertaking dated 26 October 2006.

C [16] The first defendant failed to comply with his legal obligation as contained in the letter of pre-agreement/undertaking that led to the 1333 Suit. Despite having failed to prove his case before the learned trial judge, the plaintiff was successful before the Court of Appeal. The first defendant has since paid the plaintiff the sums directed by the Court of Appeal which includes:

- D (i) judgment sum of RM8,018,225 together with costs of RM100,000; and
(ii) interest at 5% per annum from the date of filing to the date of realisation.

E [17] The plaintiff's claim in whatever form he has pleaded arises solely from the evidence that was presented by the defendants, their testimony, affidavits, and even legal submissions that were filed or stated at the trial of the 1333 Suit. This can be seen in paras. 32 to 70 of the plaintiff's statement of claim.

F [18] I reproduce several paragraphs of the plaintiff's statement of claim to show that the plaintiff's claim relies on the alleged perjury and fraud in the testimony and the conduct of the defence by the first defendant and the other defendants, who were witnesses at the said trial:

Examples from the statement of claim:

(i) Paragraph 32

G 32. The plaintiff states that in the course of defending the 1333 Suit, the first defendant together with the rest of the defendants, *vide* their fraudulent and/or unlawful acts, committed perjury, fraud of the plaintiff and to cause the plaintiff damage and loss with respect to his claim under the 1333 Suit;

H (ii) Paragraph 33

I 33. The plaintiff further states that in the course of defending the 1333 Suit, the first to sixth defendants and/or any of them in part, *vide* their fraudulent and/or unlawful acts, fabricated and/or forged documents and introduced fabricated evidence knowing that they were false. Such acts, were committed at the expense of the plaintiff and to cause the plaintiff damage and loss with respect to his claim under the 1333 Suit;

(iii) Paragraph 43

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The strategy and tactics employed by the first defendant over 13 years to deny and deprive the plaintiff of the sum of RM8,018.225 were carried out to the very last minute possible, thereby inflicting maximum damage and losses to the plaintiff;

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(iv) Paragraph 45

The plaintiff states that throughout the proceedings of the 1333 Suit, the second defendant had conspired with and fraudulently aided and/or abetted the first defendant in giving support to the false claims and/or fabrication of facts alleged by the first defendant in the affidavit affirmed by the second defendant and in his testimony during trial both in his witness statement and/or on the witness stand, ...

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(The above is repeated for the third, fourth, fifth and sixth defendants at paras. 49, 52, 56 and 59 of the statement of claim)

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(v) Paragraph 60

The plaintiff states that the above fraudulent acts by the defendants had caused damage to the plaintiff and they had fraudulently, willfully, and deliberately committed such acts in order to deny the plaintiff from successfully claiming the debt against the first defendant and to support and allow the first defendant to fraudulently counterclaim successfully against the first plaintiff until it was reversed by the Court of Appeal;

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(vi) Paragraph 61

The plaintiff shall refer to all the affidavits, witness statements, notes of evidence and testimonies of the defendants including submissions throughout the 1333 Suit and the 1694 Appeal at the hearing of this matter to demonstrate such acts committed by the defendants above;

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(vii) Paragraph 62

Further to the above, the plaintiff states that the first to sixth defendants or any of them in part conspired and combined amongst themselves with the intention to injure the plaintiff through unlawful means to:

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(i) defraud and deprive the plaintiff from receiving the RM8,018,225 sale proceeds that the plaintiff was entitled from the first defendant for the sale of his ECT shares to the first defendant;

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(ii) make a false claim against the plaintiff for the sum of RM3,584,211.42 for alleged personal loans given by the first defendant to the plaintiff;

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- A (iii) cause or with the knowledge that it will cause the plaintiff's mining ventures and business to collapse.
- (iv) causing the plaintiff to go bankrupt; and
- (v) cause paid and suffering to the plaintiff.
- B [19] Even the background facts pleaded in this suit relate to the same facts that were argued and pleaded in the 1333 Suit as seen in paras. 8 to 25 of the statement of claim.
- C [20] I also note that the damages prayed for in paras. 71, 72, 73, 74 and 75 of the statement of claim were all concerning the failure of the first defendant to pay the sum of RM8,018,225 and for defending the 1333 Suit as well as the first defendant's counterclaim. The plaintiff states that the "battle raged on from 2007 to the payment of the judgment sum in 2021".
- D [21] This is clearer when one refers to paras. 73.2, 73.3 and 73.4 of the statement of claim where the plaintiff pleaded:
- E 73.2 The first defendant's conduct and action in concocting a false defence and false counterclaim in the 1333 Suit were made with the ulterior motive of defrauding and depriving the plaintiff of his right to receive the RM8,018,225 sale proceeds from the sale of the plaintiff's ECT shares to the first defendant, and to falsely claim from the plaintiff a sum of RM3,584,211.42 to stifle or stop the plaintiff's legal action against the defendant.
- F 73.3 The first defendant's conduct and action in concocting a false defence and false counterclaim in the 1333 Suit were made with the ulterior motive to injure the plaintiff while knowing the consequences of depriving the plaintiff of his right to receive the RM8,018,225 sale proceeds from the sale of the plaintiff's ECT shares.
- G 73.4 The defendant's conduct and actions in knowingly giving false testimonies under oath or fabricating and/or use of fabricated documents in the course of the 1333 Suit and/or the 1694 appeal and/or in preparing cause papers and trial documents have been calculated by the defendants or any of them in part to make a profit and/or gain for themselves or any of them that may well exceed the compensation payable to the plaintiff.
- H [22] In response to the application to strike out, the plaintiff's counsel contends that his client could not have included the claim for the tort of abuse of process, malicious falsehood, and the alleged fraud, on the ground that his client did not have a complete cause of action at the time the 1333 Suit was filed. He states that his client is only able to file the action now based on the pleaded cause of action once his client's claim is decided in his client's favour.
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[23] I am however of the opinion that the counsel is mistaken at least relating to the tort of abuse of process and the related fraud or perjury relied on by the plaintiff. In support of this position, I refer to the decision of Gopal Sri Ram JCA (as he then was) in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340:

Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 he said:

In a civilized society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.

Because it has been developed on a case by case basis as other common law wrongs have, the tort of abuse of process, its entry into the law of torts, has undergone change through history. The essential elements of the tort in present day context have been set out in the instructive judgment of the High Court of Australia in *Williams v. Spautz* 107 ALR 635.

... In my judgment, the essential elements of the tort of abuse of process are these:

- (1) The process complained of must have been initiated;
- (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

- A (3) The plaintiff must have suffered some damage or injury in consequence.

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously.

B Neither does he have to prove that the proceedings terminated in his favour.

It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages

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- [24] The above legal proposition has been accepted by the Court of Appeal to be correct as seen in *Tetuan Bee Ling & Co lwn. Vijendran Ponniah* [2010] 6 CLJ 643. I also refer to the decision of the Canadian Court in *Atland Containers Ltd v. Macs Corp* [1974] CanLii 864 and the decision of the High Court of Australia in *Bayne v. Blake* [1909] 9 CLR 347 and in *Spautz v. Williams* [1992] HCA 34 where Mason CJ stated:
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25. In elucidating the principles governing the exercise of the inherent jurisdiction, the courts have had regard to the tort of collateral abuse of process. This cause of action has been recognized in England (24) *Grainger v. Hill* [1838] EngR 365; (1838) 4 Bing (NC) 212 (132 ER 769); *Gilding v. Eyre* [1861] EngR 793; (1861) 10 CB (NS) 592 (142 ER 584); and, more recently, *Speed Seal Ltd. v. Paddington* (1985) 1 WLR 1327, at pp. 1334-1335 and *Metall and Rohstoff v. Donaldson Inc.* (1990) 1 QB 391, at p. 469, the United States (25) *Prough v. Entriken* (1849) 11 Pa. 81 and Canada (26) *Guildford Industries Ltd. v. Hankinson Services Ltd.* (1973) 40 DLR (3d) 398.

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F It was recognized by this Court in *Varawa v. Howard Smith Co. Ltd.* (27) [1911] HCA 46; (1911) 13 CLR 35 and *Dowling v. Colonial Mutual Life Assurance Society Ltd* (28) [1915] HCA 56; (1915) 20 CLR 509.

26. The tort of collateral abuse of process differs from the older action for malicious prosecution in that the plaintiff who sues for abuse of process need not show: (a) that the initial proceeding has terminated in his or her favour; and (b) want of reasonable and probable cause for institution of the initial proceeding (29) *Grainger v. Hill*.

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27. Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. The centrality of this element in the tort was recognized in the case which is generally recognized as having established the tort of abuse of process, *Grainger v. Hill*. In that case, the defendants lent money to Grainger in September 1836, secured by a mortgage on a ship. The money was to be repaid in September 1837. However, the defendants decided to seek possession of the ship's register before the loan was due to be repaid. When Grainger refused to repay the loan in response to the defendants' threat of arrest, they commenced an action in assumpsit in the King's Bench for recovery of the loan. A writ of *capias* was issued endorsed for bail pursuant to

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which the debtor was arrested. When the writ was issued on the instructions of the defendants, the sheriff's officers who served the process on Grainger told him that they had come for the register and that, if he did not deliver it or find bail, they would take him into custody. Grainger was imprisoned for twelve hours before he handed over the register. He then sued the defendants in a special action on the case. *They sought a nonsuit, arguing that it had not been proved that the defendants' action had terminated and that Grainger had not alleged an absence of reasonable and probable cause. These arguments would have prevailed if Grainger's action had been for malicious prosecution or malicious arrest.*

(emphasis added)

[25] I must also refer to the decision of the Court of Appeal in *Chang Nga & Ors v. Lee Lang & Ors* [2009] CLJU 372; [2009] 1 LNS 372, where Gopal Sri Ram JCA stated:

6. We must mention here that the learned counsel has a third string to his bow. He says that his pleading is safe from summary dismissal because his clients are also the victims of the tort of conspiracy which Lord Diplock in *Lonrho Ltd & Anor v. Shell Petroleum Co. Ltd & Anor (No 2)* [1982] AC 173 described as "a highly anomalous cause of action". But, in our view, whatever the tort that may be pleaded, the answer must remain the same on the facts of this case. For, an efficacious remedy is available to the instant appellants/plaintiffs internally, that is to say, within the very suits or proceedings they complain about in their pleading. Take for example the proceedings mentioned in paragraph 15(b) of the amended statement of claim described as follows:

15. (b) "On 21/5/2001 the defendants filed a Winding Up Petition in the Kuala Lumpur High Court against the 9th plaintiff and naming all the plaintiffs as Respondents namely Companies Winding Up Petition No. D2-28-507-2001 which Winding Up Petition was struck off with costs on 9/10/2001.

7. It is common ground that on appeal the petition in question was reinstated and restored to file by an order of this court. So, if it is the instant appellant's complaint that the petition is the product of a conspiracy to commit an abuse of process that in itself must surely be a defence or answer to the petition. See *Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd* [1986] CLJ 279 (Rep); [1986] 1 CLJ 493. In that case, VC George J (later JCA) dismissed a winding up petition on the ground it was an abuse of the court's process. In doing so he relied on the following passage in the judgment of Plowman J in *Re Bellador Silk Ltd* [1965] 1 All ER 667:

A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that I would dismiss this petition.

A 8. Once you see this case in the light of the principle already alluded to, it is plain and obvious that the plaintiff is not out of court in any of their claims. This is not therefore a case in which a litigant has been driven from the judgment seat without having his or her day in court being made available. The appellants before us will have their day in court in respect of the proceedings set out in each of the paragraphs of their statement of claim.

B 9. It is settled law that a pleading should not be struck out merely on the ground that a plaintiff is not likely to succeed at the trial; for that will be a usurpation of the trial judge's function. See *Mooney & Ors v. Peat, Marwick, Mitchell & Company & Anor* [1966] 1 LNS 109; [1967] 1 MLJ 87. But this is not such a case. This is a case where the plaintiffs' pleading is demurrable.

C 10. For the reasons already given, this is a plain and obvious case to which summary jurisdiction established under O. 18 r. 19 may be applied. We therefore find ourselves in agreement with the order made by the High Court. The appeal is therefore dismissed. The appellant must pay the respondents their costs of this appeal. The deposit in court shall be paid out to the respondents to account those costs.

(emphasis added)

E [26] The facts that the plaintiff relies on, *ie*, the alleged fraudulent evidence presented at trial, alleged perjury, alleged false affidavits and legal submissions filed by the first defendant with the alleged assistance of the other defendants, were all available during the 1333 Suit. There are no valid reasons presented by the plaintiff that prevented him or his counsel from filing a claim based on the tort of abuse of process against the first defendant in the 1333 Suit. This could have and should have been undertaken in the 1333 Suit, at the very least as an answer to the counterclaim filed by the first defendant.

F [27] Therefore, since the plaintiff opines that the evidence presented in the affidavits, documents filed and the submissions were false and were intended for a collateral purpose of exerting pressure against the plaintiff, then he should have raised these issues in the 1333 Suit. This is exactly what VC George J (as he then was) said in *Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd & Ors* [1984] 2 CLJ 88; [1986] CLJ (Rep) 279:

that the presentation of the petition is an abuse of the process of court. Where there is an abuse of the process of the court, the judges can and will intervene to stop it as I do in this case.

H [28] The same can be seen in the decision of Mahadev Shankar J in *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695; [1996] 3 MLJ 259. In that case, the residents of Bukit Gasing had filed a judicial review to quash a development given by MPPJ and for any other consequential relief. The plaintiff, the developer was also named as the second defendant in the earlier suit. Leave to institute proceedings was refused and subsequently, the plaintiff filed a fresh suit against the residents. I The claim was also based on (i) an alleged conspiracy to injure the plaintiff

(ii) the defendants/residents had committed the tort of abuse of process and/or malicious prosecution and (iii) the action was bound to fail. The developer also sought general damages and exemplary damages for the earlier suit based on the above-referred torts.

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[29] On the issue of the right to raise the issue of abuse of process, Mahadev Shankar J stated:

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As a general rule, I think it safe to state that a litigant who is a party to a civil proceeding who claims that those proceedings are an abuse of process, must take that objection in those very proceedings under Order 18 rule 19(1)(d). The filing of a collateral action as was done in this case is itself an abuse of process which must result, as happened here in its being struck out.

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This decision was quoted with approval and was even restated in the grounds of Low Hop Bing JCA in *Lim Chee Kuo v. The Pacific Bank Bhd* [2009] CLJU 654; [2009] 1 LNS 654; [2011] 5 MLJ 230.

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[30] Given the above, I find that, at the very least, relating to the tort of abuse of process and the interrelated fraud alleged against the defendants, the claim is barred by the doctrine of *res judicata*. The plaintiff should have and could have instituted the claims against the defendants for the alleged tort of abuse of process in the same 1333 Suit.

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[31] I am aware that the second to sixth defendants were not a party to the 1333 Suit. This, however, does not mean that the doctrine of *res judicata* does not apply to those who were not a party to the earlier suit. There are always circumstances where the doctrine is legitimately extended not only to parties who were party to the earlier suit but also may apply to those who are privy to the parties involved in the earlier suit.

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[32] An example can be seen in the case of *Dr Aishah Tul Radziah L Hussin v. Dr Suresh Kumarasamy & Ors* [2015] 10 CLJ 222. In that case, the patient, Zalina, had earlier sued the plaintiff in the Sessions Court for negligence. The first to the third defendants in the case before the Sessions Court had testified on behalf of the patient and led to the finding of negligence against the said plaintiff.

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[33] The plaintiff is unhappy with the evidence presented by the defendants in the earlier suit, then instituted proceedings against them in the High Court. She alleges that it was the negligence of the defendants, based on the same facts alluded to at the earlier trial, that had caused the complaint levelled by the patient in the earlier suit. The court struck out the new suit filed by the plaintiff on the doctrine of *res judicata*.

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[34] Justice Nantha Balan (as he then was) explained in the said case:

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[62] I accept that there is jurisprudence which supports the proposition that there must be privity of interest in order for a party to raise a plea of *res judicata*. On the other hand, Senior Federal Counsel has correctly

A pointed out that there is a line of cases which have accepted that the plea of *res judicata* is also available in situations where the parties are not the same.

[63] In this regard reference was made to Drake J's judgment in *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547 where he opined that issue estoppel applied even where there is no identity of parties. This is what was said in that case:

Where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to relitigate the issue prevented from doing so by issue estoppel but it would also be an abuse of process to allow the issue to be relitigated. It followed that since the issue of negligence had already been determined against the consultant engineers in the first action they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence. Their defence denying negligence would accordingly be struck out ...

[64] Counsel for Dr Aishah describes this as an incautious statement from the English High Court. On the other hand, the Senior Federal Counsel submitted that the said passage was applied by Abdul Malek J in *Benjamin Wong Peng Yan v. Genting Bhd & Anor* [1994] 1 CLJ 351; [1993] 3 MLJ 713 at p. 724. He also referred to other local cases which have adopted the jurisprudence which is suggestive of an extension of the doctrine of *res judicata* in the sense that for *res judicata* to apply, parties need not be the same.

[65] In *Jak Kwang Builders & Developers Sdn Bhd v. Ng Chee Keong & Ors* [2001] 1 LNS 112; [2001] 4 MLJ 391 at p. 400 the High Court held:

Even though the first and second defendants are not parties in the first suit, the crux of the matter in the second suit, where the intention of the plaintiff is to stop the arbitration from proceeding, effectively amounts to a substantial duplication of issues and reliefs sought in the first suit. For *res judicata* to apply, parties need not be the same (see *Wong Peng Yan Benjamin v. Genting Bhd & Anor* [1993] 3 MLJ 713).

[66] In *Nanang International Sdn Bhd v. The China Press Bhd* [1999] 6 CLJ 213; [1999] 2 MLJ 681 at p. 218 (CLJ); pp. 686-687 (MLJ) the High Court held:

The doctrine of issue estoppel has been given a wider construction and extended to preclude a party to a proceeding from re-litigating in a second proceeding identical issue of fact, law or mixed fact or law which have been determined against him in the earlier proceeding irrespective of whether the second proceeding involves different parties.

[67] Then in *Adenan Ismail v. Naluri Corporation Bhd & Ors* [2010] 1 LNS 486; [2010] MLJU 494 the High Court held that:

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Learned counsel for the plaintiff submitted that this court must satisfy that the parties in the Tajudin's Suit and this instant case are the same parties.

Even if the plaintiffs in the instant case and in the Tajudin's Suit are not the same parties, Abdul Malek Ahmad J (as the late President of the Court of Appeal) held in *Wong Peng Yan Benjamin v. Genting Bhd & Anor* [1993] 3 MLJ 713 that for *res judicata* to apply, the parties need not be the same.

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[71] In my view, certain compelling circumstances may warrant a departure from the requirement for privity of interest where to insist on it may be unfair or oppressive or may even constitute an abuse of process. The present case is a vivid example of a compelling case for *res judicata* to apply in favour of HPP and its doctors notwithstanding that they were not parties in the first suit but rather were only witnesses. *The significant feature of the first suit is that HPP and its doctors were in pith and substance on trial (if I may put it that way) vis-a-vis the issue of their (alleged) negligence in the diagnosis, treatment and management of Zalina. Since that issue has been found in favour of HPP and its doctors, I am of the view that it may not be resurrected by way of the present suit as that issue is now barred by issue estoppel.*

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Effect Of Failure To Join HPP And Its Doctors As Third Parties Or Co-defendants

[72] So taking the present set of circumstances, where HPP and its doctors had participated at the trial of the first suit and had been challenged as to their competence and handling of Zalina and having had a ruling made in their favour that they had not been negligent (which was upheld on appeal) and where it was open to Dr Aishah to have them joined as parties to the first suit but chose not to, it cannot be said that merely because they were not parties to the f

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(emphasis added)

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[35] The same position was adopted by the High Court of Hong Kong Court in *Loh Kai Shui v. HSCB International Trustee & 3 Ors* [2021] HKCF11539, where on this issue, Wilson Chan J held:

40. Separately from the point on "privies", the Henderson doctrine can be invoked by non-parties, including witnesses, to the prior litigation that is said to ground the abuse.

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151. Further, as *Spencer Bower and Handley* on *res judicata* (*supra*) notes, the Henderson doctrine can be invoked for the protection not only of parties, but also of witnesses: see §26.12.

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A 155. *The rationale for enabling witnesses in prior proceedings to rely on the Henderson doctrine is obvious.*

156. *From a public interest perspective, such duplication of proceedings is a waste of precious court time and resources. That is in addition to the risk of inconsistent findings which threaten to bring the administration of justice into disrepute.*

B 157. *From a private interest perspective, too, it is highly vexatious and oppressive to the witness: not only in terms of time and costs, but also in that the “dry-run” of the claim in the prior proceedings (for example by the plaintiff’s ability to cross examine the witness) affords the plaintiff an opportunity to refine his case and work around any defence, evidence or explanation that the witness (now the defendant in the subsequent action) has put forward.*

C (emphasis added)

[36] I am of the view that it would be abusive for the plaintiff to now attempt to re-open the issues again in this new suit. The claim against the second to sixth defendants is all concerning the evidence that was presented in the earlier suit and the damages claimed are all relating to the failure of the first defendant to pay the principal sum of RM8 million expeditiously.

D [37] I find that there is clear “substantial duplication of issues and reliefs sought in the” 1333 Suit and those now claimed by the plaintiff before me against the defendants. These issues should have and could have been raised in the earlier suit and to allow the plaintiff to have a second bite of the cherry with a clear attempt to seek additional damages based on the same facts afresh as those raised or could have been raised in the 1333 Suit would be wrong.

E [38] The alleged perjury and alleged fraudulent representation of evidence by the defendants were before the High Court and were eventually dealt with by the Court of Appeal. This can be seen in paras. 35 to 62 and 65 to 73 of the grounds of the Court of Appeal dated 10 January 2019 delivered by Mary Lim JCA (as she then was). It cannot, therefore, be said that these issues were not before the court in the 1333 Suit. To allow the plaintiff to reopen this issue would be contrary to the principle of *res judicata*.

F [39] For the above, I find that the plaintiff is barred from pursuing the claim based on the tort of abuse of process against the first, third fourth and fifth defendants.

Whether The Plaintiff Has Pleaded Valid Causes Of Action Against The Defendants

H Malicious Prosecution

I [40] Regarding the claim of malicious prosecution, I find that the current Malaysian jurisprudence on this cause of action limits the application of the said tort to claims that relate to either the institution of winding up or bankruptcy proceedings that were instituted *mala fide*.

[41] I refer to the decision of the Court of Appeal in *KHK Advertising Sdn Bhd v. Siera Management Sdn Bhd (In Liquidation)* [2018] 8 CLJ 423; [2018] 4 MLJ 168, where Alizatul Khair JCA (as she then was) held:

[53] As pointed out by learned counsel for the plaintiff and as observed by Lord Steyn in *Gregory (supra)* under English law, the tort of malicious prosecution is not, at present generally available in respect of civil proceedings, it being primarily utilised against criminal proceedings. It was only admitted in a civil context in a few special cases, in particular for abuse of legal process and the malicious presentation of a winding-up order or petition in bankruptcy.

[54] In view of the limited and narrow scope in which a tort of malicious prosecution can be brought in a civil proceeding, the burden placed on the plaintiff is a fairly onerous one. The court when hearing a claim for malicious prosecution has to weigh carefully the interest of the plaintiff on the one hand and the defendant's right to institute proceedings on the other.

[55] As stated in *Clerk and Lindsell on Torts*, 18th edn. at paras 16-01:

in relation to malicious prosecution the interests of the claimant must be weighed against the defendant's right to institute proceedings if he does so with the honest intention of protecting his own, or the public interest, or if the circumstances are such that whatever the defendant's own motives there are good grounds for instituting a prosecution.

[56] The principles set out in *Gregory* (see para [25] above) and *Clerk and Lindsell (supra)* were applied by our courts in *Semesta Insurance Underwriting Agency Sdn Bhd (supra) v. Koperasi Insurance (M) Sdn Bhd* [1999] 7 CLJ 123; [2011] 3 MLJ 379 where Ramly J (as he then was) held that:

To be actionable as a tort the action taken by the defendant must have been without reasonable and probable cause, must have been instituted or carried on maliciously and have been terminated in the plaintiff's favour. The plaintiff must also prove damage.

[42] Vernon Ong JCA (as he then was) in *Vivaganth Santharasilan v. Public Bank Bhd* [2019] 1 CLJ 605 limited the tort of malicious prosecution to special cases relating to bankruptcy proceedings or the presentation of winding-up proceedings. His Lordship specifically stated:

[12] The tort of malicious prosecution is a common law wrong. It strikes at the balance between two countervailing interests of social importance: safeguarding the individual from being harassed by unjustified litigation and encouraging citizens to aid in law enforcement. On the one hand, it is the right of every person to put the law in motion if he does it with the honest intention of protecting his own or the public interest. Conversely, if legal proceedings are initiated against an individual for a collateral purpose or without any proper basis or foundation for believing that they will ultimately succeed, that individual may suffer great injury

A during the course of the proceedings. That individual who is aggrieved by legal proceedings improperly instituted against him may sue for damages for the tort of malicious prosecution.

[13] Under English law, the tort of malicious prosecution is limited to malicious institution of criminal prosecutions and is not generally available in civil proceedings. It has, however, been extended to civil claims which constitute special cases of legal process such as the malicious prosecution of a petition in bankruptcy or the malicious presentation of a winding-up petition (as observed by Lord Steyn in *Gregory v. Portsmouth City Council* [2000] 1 All ER 560 HL; see also *KHK Advertising Sdn Bhd v. Siera Management Sdn Bhd (In Liquidation)* [2018] 8 CLJ 423; [2018] 3 AMR 285 (CA) at para. [52]). Indeed, it has also been opined in *Bullen & Leake & Jacob's Precedents of Pleadings*, 14th edn vol. 1 at para. 2-06 that an action may lie for the abuse of ordinary civil process in respect of a tort of maliciously instituting civil proceedings. In most respects, the matters which must be proved and pleaded are fundamentally the same except that the proceedings do not need to have been determined in the claimant's favour.

[43] The position in England and Wales has since changed substantially. Previously, the existence of the said tort was even questioned by the House of Lords in *Gregory v. Portsmouth City Council* [2000] 1 AC 491 and in the Privy Council decision of *Crawford Adjusters v. Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17. The existence of the said tort is now recognized by the UK Supreme Court as seen in *Willers v. Joyce And Another* [2016] UKSC 43.

[44] The tort of malicious prosecution is now seen to be a valid cause of action in England and Wales. I refer to the leading judgment of Lord Toulson where he stated:

The combination of requirements that the claimant must prove not only the absence of reasonable and probable cause, but also that the defendant did not have a *bona fide* reason to bring the proceedings, means that the claimant has a heavy burden to discharge.

[45] Nonetheless, I find that the extent and limits of the said tort remains unanswered in English law. In *Quartz Hill v. Eyre* (1883) 11 QBD 674, Bowen LJ stated:

'the very institution of [insolvency] proceedings' 'strike home at a man's credit'. An action for malicious prosecution was available, but 'No mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based on fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action.' As to the costs incurred in defending a civil action, he said: 'The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognises, and for

which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action. Therefore the broad cannon is true that in the present day, and according to the present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution”.

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[46] In the same case, Brett MR stated:

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It seems to me that an action can be maintained for maliciously procuring an adjudication under the Bankruptcy Act 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can shew that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer a pecuniary loss ... he is openly charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial.

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The present case, therefore, is reduced to this question, namely, is a petition to wind up a company more like an action charging fraud or more like a bankruptcy petition? In my opinion it is more like a bankruptcy petition, and the very touchstone of this point is that the petition to wind-up is by force of law made public before the company can defend itself against the imputations made against it; for the petitioner is bound to publicly advertise the petition seven days before it is to be heard and adjudicated upon.

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[47] This can also be seen in the Privy Council’s analysis of malicious prosecution in *Crawford Adjusters And Another v. Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17. I refer to the judgment of Lord Wilson:

The result of the effective prohibition by the comments in the Quartz Hill case of any general development in England and Wales of a tort of malicious prosecution of civil proceedings has been to confine the tort to a few disparate situations, linked only by the occurrence of prejudice to the victim at or close to the outset of the proceedings. They include:

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- (a) a petition for bankruptcy: *Johnson v. Emerson* (1871) LR 6 Ex 329;
- (b) a petition for winding-up: the *Quartz Hill* case itself;
- (c) a writ to arrest and detain a judgment debtor who had in effect already paid the debt: *Gilding v. Eyre* (1861) 10 CB (NS) 592, 142 ER 584;
- (d) the procurement of a bench warrant to arrest and produce a person for failure to respond to a witness summons which had not been served on him: *Roy v. Prior* [1971] AC 470;

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- A (e) a writ to arrest a ship in the course of a dispute about a contract for its sale: *The Walter D Wallet* [1893] P 202;
- (f) a writ to arrest an aircraft in the course of a dispute about an alleged lease of it: *Transpac Express Ltd v Malaysian Airlines* [2005] 3 NZLR 709;
- B (g) an order for the attachment of the claimant's assets in advance of an arbitration: *The Nicholas M* [2008] EWHC 1615 (Comm), [2009] 1 All ER (Comm) 479; and
- (h) a search warrant: *Gibbs v. Rea* [1998] AC 786.
- C [48] Therefore, arguably the position in England and Wales is similar to Malaysia. The tort of malicious prosecution is limited to claims that arise in proceedings that question the financial credit of a litigant such as those arising in bankruptcy and winding-up claims.
- D [49] As I am bound by the doctrine of *stare decisis*, I find that the tort of malicious prosecution of a civil proceeding under Malaysian law does not extend to the allegations raised by the plaintiff against the defendants. I find that the claim against the defendants based on the tort of malicious prosecution should be struck out.
- The Alleged Tort Of Conspiracy*
- E [50] The elements necessary to establish or plead a tort of conspiracy against the defendant can be seen in the judgment of the Court of Appeal in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676, where Mohd Zawawi Salleh JCA (as he then was) stated:
- F [10] To appreciate the submissions advanced by learned counsel for the defendants, we think it is relevant to deal with the law of conspiracy which is part of what are known as the "economic torts". There are four elements to a conspiracy claim:
- G (i) a combination or agreement between two or more individuals;
- (ii) an intent to injure;
- (iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and
- H (iv) resulting loss and damage to the claimant.
- (See *Khoo Teng Chye v. Cekal Berjasa Sdn Bhd & Anor*, Civil Appeal No: P-02-542-03-2015 (CA) [2015] 6 CLJ 449 (CA)).
- I [11] There are two kinds of conspiracy, the elements of which are distinct:
- (i) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and

(ii) lawful means conspiracy: a combination to perform acts which, although not themselves *per se* unlawful, are done with the sole predominant purpose of injuring the claimant – it is in the fact of the conspiracy that the unlawfulness resides. (See *Milicent Rosalind Danker & Anor v. Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393 (CA)).

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[12] The distinction between the two was succinctly elucidated by Lord Bridge in *Lonrho Plc v. Fayed & Others* [1991] 3 All ER 303 as follows:

Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

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I also refer to the decision of the Court of Appeal in *TAZ Logistics Sdn Bhd v. TAZ Metals Sdn Bhd & Ors* [2019] 2 CLJ 48.

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[51] The allegations of conspiracy, in this case, pertain to the same unlawful acts based on the alleged tort of abuse of process and the tort of malicious prosecution. Despite the claims have been identified separately by the plaintiff as being (i) fraud and perjury, (ii) tort of abuse of process and (iii) malicious prosecution, these claims are based on the same factual matrix that is the alleged false evidence, affidavits, documents, and legal arguments presented at the 1333 Suit.

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[52] Nonetheless, based on the pleadings before me, I find that the plaintiff has sufficiently pleaded the necessary elements for the tort of conspiracy against the defendants.

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[53] I, therefore, decline to exercise my discretion to strike out the claim for conspiracy on this ground.

The Alleged Tort Of Fraud Based On The Alleged Perjury – Independent To The Tort Of Abuse Of Process

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[54] Malaysian common law as it stands does not recognise a general tort of fraud based on the alleged perjury in the 1333 Suit as suggested by the plaintiff. At best, only the tort of abuse of process and the tort of malicious prosecution are recognised as being valid causes of action by a plaintiff for any claims that were either maliciously instituted or those that were undertaken not for valid purposes.

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A [55] I am also of the opinion that the alleged existence of this tort will also
be contrary to the doctrine of *res judicata* and even to the common law
doctrine of witness immunity that has been recognised under our laws. Once
this new tort is recognised it will potentially lead to the opening of floodgates
to every litigant who is dissatisfied with the evidence presented by witnesses
B for the other side on the ground of perjury and fraud. Furthermore, the issue
of perjury or presentation of false evidence should have and could have been
raised in the earlier suit. It would be inappropriate for this court to now
investigate the same factual matrix and the evidence presented by the
defendants at the 1333 Suit to determine again whether they have perjured
themselves. These issues should have been dealt with in the said 1333 Suit
C and not by fresh proceedings.

[56] Although our courts rarely look at American jurisprudence to assist in
its understanding of the common law, I find that the judgment of the New
York Supreme Court in *Smith v. Lewis* 3 Johns 157 (NY Supreme Court
D 1808) to be useful on this issue.

[57] In that case, the plaintiff brought an action in a New York court
alleging that the defendant produced a witness in an earlier trial in
Connecticut that had perjured himself. The plaintiff contends that because of
the perjured testimony he was found guilty of land fraud in the said suit. The
E Supreme Court of New York agreed that no such tort existed and struck out
the said suit.

[58] Spenser J on this issue held:

F The questions presented are; 1. Is it actionable to suborn a witness to bear
false testimony, whereby a verdict is given contrary to the truth and justice
of the case?

...

G These are all the cases which have been cited or met with, that bear on
the question, and although they are all cases against the party committing
the perjury, their application cannot be doubted; for if the very person who
has committed the supposed injury is not answerable, surely the person
procuring it will not be held amenable. According to the rule of Lord
Coke, it is better to submit to a particular inconvenience, than introduce
a general mischief which, in my opinion would be the case, were we to
maintain this action, *If a perjury has been committed, let the defendant who is*
H *alleged to have procured it, be punished according to the known law of the land, and*
not in a way altogether novel and unprecedented, nay, even against decisions.

(emphasis added)

[59] This could also be seen in *Ross v. Preston* 292 NY433; *Crouse*
v. McVickar 207 NY213 and *Ross v. Wood* 70 NY8.

I [60] On this ground, I am of the view that the tort of fraud based on the
perjury in the earlier suit as suggested by the plaintiff, does not exist under
our laws. I, therefore, exercise my powers to strike out the aforesaid claim
against the defendants that is grounded on this alleged tort.

Witness Privilege

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[61] I will now deal with the issue of witness privilege. Under English law, this immunity is still applicable and in certain limited circumstances, the said immunity no longer exists. I find guidance from the decision of Joanna Smith J in *Greig William Alexander Mitchell & Kenneth Melvin Kryz (Joint liquidators Of MBI International) v. Sheikh Mohamed bin Issan Al Jaber & Ors* [2021] EWHC 912 (Ch).

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[62] In that case, Joanna Smith J explained that:

38. The general principle of absolute immunity or privilege is long established. In the 1772 decision of Lord Mansfield in *The King v. Skinner* 98 ER 529 (at 530) he described it as applying to various participants in legal proceedings as follows:

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neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the court will take notice of them as a contempt, and examine on information. If anything of *mala mens* is found on such enquiry, it will be punished suitably.

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39. A more recent expression of the same principle appears in the speech of Lord Hobhouse in *Arthur JS Hall & Co v. Simons* [2002] 1 AC 615 (“*Hall v. Simons*”) at 740 (a passage referred to in the speech of Lord Phillips in *Jones v. Kaney* [2011] 2 AC 398 (“*Jones v. Kaney*”) at [1]):

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A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation...Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity”.

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[40] *The immunity of witnesses as a general class is a privilege enjoyed by witnesses who give evidence in civil or criminal proceedings. Its purpose is to “protect witnesses against claims made against them for something said or done in the course of giving or preparing to give evidence” (per Lord Hope in Darker at 448E). It is thus an immunity “from any form of civil action in respect of evidence given (or foreshadowed in a statement made) in the course of proceedings” (per Lord Brown in Jones v. Kaney at [65]). Where it applies, the principle bars a claim (whatever the cause of action) in subsequent proceedings, with the exception of suits for malicious prosecution, misfeasance in a public office and prosecutions for perjury, perverting the course of justice and for contempt of court (see eg, Jones v. Kaney, per Lord Collins at [82]). Furthermore, “where the immunity exists it is given to those who deliberately and maliciously make false statements; the immunity is not lost because of the wickedness of the person who claims immunity” (Darker per Lord Hutton at 468C).*

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[41] The scope of the principle was considered most recently by the Court of Appeal in *Daniels v. Chief Constable of South Wales* [2015] EWCA Civ 680 (“*Daniels*”). At para. [34] of his judgment, Lord Justice Lloyd Jones identified the justifications for the immunity and the need for it to be limited only to particular categories of case:

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A [34] In *Jones v. Kaney* [2011] UKSC 13; [2011] 2 AC 398, Lord Phillips (at [16]-[17]) summarised the justifications for witness immunity given by the House of Lords in *Darker v. Chief Constable of the West Midlands Police* [2001] AC 435 as follows:

- B (1) To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims;
- (2) To encourage honest and well-meaning persons to assist justice, in the interest of establishing the truth and to secure that justice may be done;
- C (3) To secure that the witness will speak freely and fearlessly; and
- (4) To avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again.

D However, it must be emphasised that the effect of a successful plea of immunity is to deny access to the courts and, in many cases, to leave a wrong without a remedy. As Lord Cooke observed in *Darker* (at p. 453 D-E) absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. Accordingly the immunity must be limited to cases where it is necessary to achieve the objectives identified above.

E [42] As will be clear from the extract from Lord Hope's speech in *Darker* referred to above, the immunity has been recognised as falling into two distinct categories: the 'core immunity' attaching to the giving of evidence in court (see for example *Roy v. Prior* [1971] AC 470 per Lord Morris at 477F: "It is well settled that no action will lie against a witness for words spoken in giving evidence in a court even if the evidence is falsely and maliciously given"), and the 'extended immunity' attaching to the carrying out of acts preparatory to the giving of evidence in court (see for example *Hall v. Simons*, per Lord Hoffmann at 687B-C: "The immunity has also been extended to statements made out of court in the course of preparing evidence to be given in court").

G [43] Many of the recent cases (including both *Daniels* and *Darker*) have been concerned with the scope of this extended immunity; in the case of *Darker* by reference to whether the extension applied to protect police officers who were alleged to have fabricated evidence, as opposed to having given false evidence, from claims of conspiracy to injure and misfeasance in public office. In the case of *Daniels*, by reference to whether the extension applied to protect police officers who deliberately or recklessly failed to make proper disclosure or provided misleading disclosure.

H [44] In considering this extended immunity, Lord Justice Lloyd Jones said in *Daniels* (at [39]):

I In order to achieve the objective of enabling witnesses to speak freely in judicial proceedings it has been necessary to extend the absolute immunity beyond the giving of evidence by witnesses when they are actually in the witness box. Thus it has been extended to statements made by a witness in the course of the

preliminary examination of witnesses to find out what they can prove (*Watson v. M'Ewan* [1905] AC 48). It has also been extended to statements made out of court which could fairly be said to be part of the process of investigating a crime or possible crime with a view to prosecution. An example of this second category is *Taylor v. Director of the Serious Fraud Office*.

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[45] Having considered the facts of *Taylor v. Director of the Serious Fraud Office* [1999] 2 AC 177 ("*Taylor*") in detail, Lord Justice Lloyd Jones went on at paragraph [40] to emphasise that "... the immunity is essentially a witness immunity concerned with the giving of evidence and the making of statements in judicial proceedings, which has necessarily been extended in the various ways indicated above". The immunity did not extend to "conduct unconnected with the giving of evidence or the making of statements".

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[46] Originally, witness immunity overlapped to a degree with a wider immunity enjoyed by advocates from claims made by their own clients for a failure to exercise reasonable care and skill in the conduct of litigation on behalf of those clients. However, this wider advocates' immunity was abolished by the House of Lords in *Hall v. Simons*. Advocates continue to be protected by absolute privilege from a claim in defamation in relation to statements made in the course of the conduct of legal proceedings (see *Jones v. Kaney* per Lord Phillips at [13]).

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[47] Insofar as Lord Hoffmann in *Hall v. Simons* had sought to distinguish between the position of the advocate and the expert witness in arriving at his decision (on the grounds that "*A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth*" at 698), that distinction came under scrutiny in *Jones v. Kaney*. This was a case involving the liability of a so-called "friendly expert" to be sued by his client. The Supreme Court decided to abolish the immunity from suit for breach of duty which expert witnesses had previously enjoyed in relation to their participation in legal proceedings. The abolition did not extend to the position of the adverse expert.

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[48] Lord Phillips expressed the view (at [46]) that it was wrong to distinguish between an expert witness and an advocate on the basis that the latter is the only person who has undertaken a duty of care to the client. Both advocates and experts undertake a duty to provide services to the client, such that "the expert witness has far more in common with the advocate than he does with the witness of fact" (per Lord Phillips at [50]). A key distinction identified by Lord Phillips (at [18]) between an expert witness and a witness of fact being that "the former will have chosen to provide his services and will voluntarily have undertaken duties to his client for reward under contract whereas the latter will have no such motive for giving evidence".

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[49] Lord Collins identified the basis for the decision in *Jones v. Kaney* as being that "where a person has suffered a wrong that person should have a remedy unless there is a sufficiently strong public policy in maintaining an immunity" ([72]). Lord Dyson made it clear at [125] that nothing he had said in support of the majority decision was "intended to undermine the long-standing absolute privilege enjoyed by other witnesses in respect of litigation".

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(emphasis added)

- A [63] The plaintiff's counsel attempted to rely on the decision of the UK Courts in *Jones v. Kaney* [2011] UKSC 13 and *Daniels v. Chief Constable of South Wales* [2015] EWCA Civ 680. The counsel argued that the absolute privilege no longer exists under English law and that this should also be adopted under Malaysian law.
- B [64] This is to be distinguished from the rule of absolute immunity that remains applicable in other commonwealth jurisdictions. An example of such absolute immunity can be seen in Australia in the decision of the New South Wales Court of Appeal in *Young v. Hones* [2014] NSWCA 337 and the decision of the Australian High Court in *D'Orta-Ekenaike v. Victoria Legal Aid* [2005] HCA 12. The same absolute immunity is also adopted in Canadian law as seen in *Reynolds v. Kingston (City) Police Services Board* [2007] ONCA 166 and in *Paul v. Sasso* [2017] ONSC 16.
- C [65] Malaysian law still utilises the absolute immunity rule for witnesses as seen in *Alias Othman v. Clement Kua Hock Beng & Ors* [2017] 10 CLJ 733; [2018] 7 MLJ 109 and the Federal Court's decision in *Takako Sakao v. Ng Pek Yuen & Anor (No 3)* [2010] 1 CLJ 429; [2010] 2 MLJ 141. However, I note that the issue of absolute immunity of witnesses in *Takako Sakao (supra)* was only mentioned in passing by Gopal Sri Ram FCJ and did not make up the ratio decidendi of the said decision. The aforesaid cases were also before the decisions of the UK Supreme Court on this issue were deliberated. This issue, therefore, remains up in the air until the same is decided once and for all by our Federal Court.
- D [66] I do not make any determination as to whether Malaysian law now accepts the UK approach or whether the said defence remains absolute in its traditional sense. I am of the view that as with all general rules, there will always be exceptions. From my reading of the above cases and the grounds of Justice Joanna Smith in the above-referred case, I find that the limit to the said witness's immunity arises where it could be shown that the said witness has a duty to the litigant such as a friendly expert or where the statements were made not as part of court proceedings.
- E [67] For this case, I opine, based on the current legal position under Malaysian law, that the defendants are entitled to rely on the defence of witness immunity. To rule otherwise will fall foul of the four main purposes, as identified by Justice Joanna Smith, as to why the courts had traditionally affirmed the existence of the immunity granted to witnesses from potential suits.
- F [68] Furthermore, however egregious the conduct of the defendants in the 1333 Suits, these issues should have been heard and disposed of at the said suit. To enable the plaintiff to now file a new suit based on the same facts and same evidence against the witnesses is not in the best interest of the administration of justice.
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[69] Even if this court is to accept the position adopted in the UK Courts for our laws, I opine that the exceptions to the general rule of immunity do not apply to the pleaded case against the defendants. The defendants do not owe any duties to the plaintiff and the statements or evidence presented at the 1333 Suit and the statements were made during legal proceedings. The said immunity remains valid in favour of the defendants.

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[70] For the above reasons, I find that the claims against the defendants should be struck out.

The Plaintiff Has Been Fully Compensated For His Damages In The 1333 Suit

[71] The final issue I will deliberate on concerns the issue of damages claimed by the plaintiff in this suit against the defendants.

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[72] When I peruse the statement of claim, I find that the claim for damages relates to the failure of the first defendant to pay the sum of RM8,018,225 to the plaintiff early. This can be seen at paras. 71 to 75 of the statement of claim. Even the claims for exemplary and aggravated damages relate to the delay in payment by the first defendant. The claims relating to the loss of the mining ventures, bankruptcy and blacklisted by banks, all relate to the failure by the plaintiff to pay the sums that were due for the ECT shares. I also note that one of the claims by the plaintiff in para. 72(m) of the statement of claim is for the legal fees incurred for pursuing the 1333 Suit against the first defendant and for defending the counterclaim in the said suit.

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[73] I find that it is an abuse of process of this court to allow the plaintiff to attempt to claim new damages against the defendants based on the same failure to pay the sum of RM8,018,225 that was earlier pursued in the 1333 Suit. The plaintiff should have and could have raised these damages in the earlier suit at least against the first defendant. It would be an abuse of process of this court to allow the plaintiff a second bite of the cherry, *albeit* under different guises of claims.

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[74] I find that the Court of Appeal in the 1333 Suit had allowed the plaintiff the full sum claimed against the first defendant with interest at the rate of 5% per annum from the date of filing to the date of full realisation. If the plaintiff had suffered damages as a result of the failure by the first defendant to repay him early, *ie*, the loss of the mining ventures, bankruptcy and other financial losses, then he should have raised these claims in those proceedings. After all s. 74 of the Contracts Act 1950 provides compensation to the innocent party “for any loss or damage” that “naturally arose in the usual course of the breach, which the parties knew when they made the contract”. This avenue was available to the plaintiff and he could have

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A availed himself of the remedies provided. I also refer to the decision of the Federal Court in *Daishhowa (M) Wood Products Sdn Bhd v. Kepong Wood Products Co Sdn Bhd* [1980] CLJU 14; [1980] 1 LNS 14 and recently in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177.

B [75] I reproduce parts of the judgment of Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor (supra)*, where Her Ladyship held:

C [117] Section 74(1) and (2) in *Hamdan Johan & Ors v. Felcra Bhd & Ors And Another Case* [2010] 3 CLJ 474 was held to substantially affirm the common law rule laid down in *Hadley v. Baxendale* [1854] 9 Ex. 341; 165 ER 145 where in the general assessment of damages for breach of contract, the general rule is that the aggrieved party is to be put in the same position as they would be if the contract had been properly performed, so that normally he is entitled to recover from the contract breaker his loss of profit or the benefit of the bargain. The other cases cited by the appellant include *Bank Bumiputera Malaysia Bhd Kuala Terengganu v. Mae Perakayuan Sdn Bhd & Anor* [1993] 2 CLJ 495; [1993] 2 MLJ 76 and *Nikmat Masyhur Sdn Bhd v. Kerajaan Negeri Johor Darul Ta'zim* [2008] 9 CLJ 46 essentially set forth the same propositions ie, that the damage or loss suffered must be within the contemplation of both parties whether actual or constructive, that the loss suffered was a natural and probable result of the defendant's breach and that it included loss of profits. We have no disagreement with the statements of principle in this case. It is clear that a rate of commission amounting to 20% was agreed for the collection of the arrears, and it therefore would be the natural and probable result, as well as have been in the contemplation of the parties that premature termination would result in the loss of those profits.

F [76] I do note that the defendants' counsel, especially that of the first defendant, had argued ably that this court should strike out this suit on the principles laid down in *Heaton v. AXA Equity And Law* [2002] 2 AC 329 which I had the opportunity to consider in *Gabungan Strategik Sdn Bhd v. Geonamics (M) Sdn Bhd & Ors* [2021] CLJU 1743; [2021] 1 LNS 1743. I do not believe that the rule in *Heaton v. Axa (supra)* applies to the facts of this case.

G [77] However, I opine that the fundamental principle of *res judicata* bars the plaintiff from attempting to re-open the same set of facts again with the clear intention of claiming further sums that he had alleged loss for the failure of the first defendant to pay him promptly.

H [78] As such, the claim against the defendants for these damages should be struck out to ensure that the court process is not abused by the aforesaid litigant and to ensure finality to litigation.

I

Conclusion

A

[79] Therefore, based on the reasons provided above, I find that this is a plain and obvious case for the claims against the first, second, third, fourth and fifth defendants to be struck out with costs.

[80] I make the following orders:

B

(i) Enclosure 16

- (a) the plaintiff's amended writ dated 13 July 2021 and statement of claim dated 13 July 2021 against first defendant is struck out; and
- (b) costs of RM30,000 to be borne by the plaintiff and to be paid to the defendant subject to allocatur.

C

(ii) Enclosure 13

- (a) the plaintiff's writ and statement of claim dated 13 July 2021 against second defendant is struck out; and
- (b) costs of RM30,000 to be borne by the plaintiff and to be paid to the defendant subject to allocatur.

D

(iii) Enclosure 34

- (a) the plaintiff's amended writ and statement of claim dated 13 July 2021 against third defendant and fifth defendant is struck out; and
- (b) costs of RM30,000 to be borne by the plaintiff and to be paid to the defendant subject to allocatur.

E

(iv) Enclosure 36

F

- (a) the plaintiff's amended writ and statement of claim dated 13 July 2021 against fourth defendant is struck out and plaintiff's action against fourth defendant is dismissed; and
- (b) costs of RM30,000 to be borne by the plaintiff and to be paid to the defendant subject to allocatur.

G

H

I